UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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| REAL VIEW, LLC<br>　　　　Plaintiff,<br><br>v.<br><br>20-20 TECHNOLOGIES, INC.,<br>　　　　Defendant.<br><br>20-20 TECHNOLOGIES, INC.,<br>　　　　Counterclaim Plaintiff<br><br>v.<br><br>REAL VIEW, LLC<br>　　　　Counterclaim Defendant, and<br><br>BORIS ZELDIN and LEONID PERLOV<br>　　　　Additional Party Defendants<br>　　　　in Counterclaim | CIVIL ACTION NO. 07-12157 |

**AFFIDAVIT OF WILLIAM SMITH IN SUPPORT OF 20-20 TECHNOLOGIES'
OPPOSITION TO COUNTERCLAIM DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

I, William Smith, state as follows:

　1.　My name is William Smith. I have been employed at 20-20 Technologies, Inc. ("20-20"), since April 4, 1994. I write this affidavit based on my own personal knowledge and submit this in support of 20-20's Opposition to Summary Judgment, specifically, to refute the many incorrect, incomplete and/or misleading statements in the Affidavit

of Boris Zeldin and the motion for summary judgment filed by Real View, LLC,

Zeldin and Leonid Perlov's (collectively, the "Real View").

2.  I am currently a Design Business Analyst for 20-20.  Prior to becoming a Design

Business Analyst, I held the following positions at 20-20: Design Product Manager

and Subject Matter Expert, Solution Specialist and Subject Matter Expert for Large

Retail Accounts, Customer Support Manager, Account Manager for Home Depot,

Customer Support Liaison for Home Depot and Lowes, and Customer Support

Representative.

3.  Throughout my career at 20-20, my role has focused on the customer.  I have been

responsible for customer support, training, solution selling, and implementation at

large retail accounts like Home Depot, Lowes, IKEA, Sears and Reico.  My expertise

with 20-20 Design relates to its overall usability, implementation, and training.

4.  I received a Diplôme d'Études Collégiales (D.E.C.) from Dawson College in

Montréal, Québec, Canada.  I have taken five business management courses as part of

a certificate program at McGill University, also in Montréal.

5.  Zeldin's professional experience has centered in the general Computer Aided Design

("CAD") industry, not the Computer Aided Selling ("CAS") industry.  (*See* Zeldin

Aff. ¶¶1-8).  Both 20-20 Design and ProKitchen are examples of CAS software, as

explained below.

6.  The users of 20-20 Design and ProKitchen are mainly salespeople that act for kitchen dealers as "designer-salespeople." They are not professional CAD users. The main difference between CAS users and CAD users is that the architects and engineers who make up the population of CAD users are much more willing to embrace complex tools with a steep learning curve. CAS users' goal is to sell kitchen products, not learn how to manipulate the software program to its fullest capacity. The large majority of CAS users have no intention to learn and use sophisticated CAD software. CAS users and CAD users are therefore different target customers, and CAS and CAD software products are different families of software.

7.  Only the most technically savvy user will take the time to customize the user interface of 20-20 Design, and in my experience this is very rare. For almost all 20-20 users, the out-of-the-box interface is how they will see the program while performing kitchen design and selling.

8.  Purchasers of CAS kitchen design software tend to make their decisions based on familiarity and the promise of a quick return on investment. Most purchasers of 20-20 Design make their decisions quickly, and the user interface, look and feel, and the way in which the program allows them to solve their specific kitchen design problems are very important. The learning curve is therefore an important part of the decision to purchase a kitchen design software.

9.  Boris Zeldin states in his affidavit that Real View "identified 20-20 Design as the dominant product in the kitchen design software market." (*Id.* ¶ 9.) However, 20-20

recognizes many competitors in addition to ProKitchen all over the world, such as Chief Architect and Configura in North America, ProCAD in Brazil, Yuang Fang in China, and Planit Fusion and Compusoft in Europe. In particular, Planit Fusion has a significant market share in Europe and market presence in North America.

10. Zeldin states that Real View and 20-20 have both developed relationships with manufacturers in order to incorporate the manufacturers' products in "catalogs" within their programs, and cites this as a defense against 20-20's allegation that ProKitchen appears almost identical to 20-20 Design to the casual user. (*Id.* ¶ 14.) Many, if not most, of the competing kitchen design software products, however, also have manufacturer catalogs (for example, Fusion, Configura, CompuSoft, ProCAD, ChiefArchitect, and others). The casual user does not find these other competing software products to be almost identical to 20-20 Design.

11. Zeldin states that Real View received descriptions of the elements of ProKitchen that 20-20 alleges infringe on its copyright. (*Id.* ¶¶ 16-18.) His list is incomplete. 20-20 alleges that Real View extensively copied the structure, user interface and the look and feel of the entire program of 20-20 Design and incorporated it into ProKitchen.

12. Zeldin details how the design of ProKitchen was shaped by certain recognized standard Microsoft Windows functions, such as File, Edit, and Help menus. (*Id.* ¶¶ 19-29.) Neither 20-20 nor its expert, Randall Davis, questions Real View's use of these standard functions. Rather, 20-20's allegations focus on Real View's copying of the expressive choices that 20-20 made in creating 20-20 Design. 20-20 Design

contains original and proprietary solutions to the specific problems of the kitchen design software.  20-20 authored all of the creative elements of the 20-20 Design user interface, including "non-menu commands interface elements" and screen displays, which ProKitchen copied..  Even within Windows, many expressive choices are possible, e.g. appearance, selection, sequence and arrangement of the different elements of a user interface.

13. Zeldin claims that the ProKitchen menus are not similar to the 20-20 Design menus. (*Id.* ¶¶ 31-33.)  This is false, as the menus are in fact similar in expression (that is, the terms used and their graphical/pictorial representations), selection (the choice of which menus to include), and arrangement (where to place each menu). But in addition, it is the extensive similarities of original 20-20 expressive choices, touching upon all aspects of the programs, including but not limited to: overall layout and interface design, sequence, appearance and layout of sub-windows, tabs and information boxes, icons and terminology, drawing and modifying walls, placing and modification of kitchen products, catalog navigation and legal disclaimer, that we allege and will factually prove were clearly copied.

14. Zeldin references Davis' observation that the expression of the "Notes/Comments" feature in ProKitchen and 20-20 Design are similar.  (*Id.* ¶ 33.)  20-20 was forced to place this element in the main menu due to legacy considerations, namely to reduce the learning curve from one release to the next.  Although the main menu is not a logical place for this option, and Real View was not constrained by the same legacy

considerations, the ProKitchen Notes/Comments option is also located in the main menu. This is strong proof that Real View copied another expressive choice of 20-20 Design.

15. Zeldin states that "Real View has not copied any of the menus in 20-20 Design." (*Id.* ¶ 33.) Given the numerous and substantial similarities between the two systems of interface elements, screen displays and other expressive elements of the user interface as cited in Davis' report, and Real View's study of 20-20 Design and its video tutorials (*id.* ¶ 11), this cannot possibly be an accurate statement. Further, 20-20 claims Real View has copied expressive choices touching upon all aspects of 20-20 Design.

16. Zeldin professes that Real View was limited in choosing terms to describe its different functions by the conventions of architectural planning and the CAD industry. (*Id.* ¶ 35.) This is false. For example, 20-20 and ProKitchen both use the term "Place" in its main menu, but this is not a standard; other competing products use the terms "Insert," "Furniture," "Design," "Library," or "Add." Different, perhaps even more logical, expressive choices were available, but Real View copied 20-20. Real View copied 20-20's expressive choices time and time again, whether it was the term or phrase used, the selection of which functions to include, or the arrangement of the underlying expressions.

17. Zeldin states that many of Real View's choices regarding how to express commands were dictated by conventions in the CAD industry. (*Id.* ¶ 39.) This is false. Other

expressive choices are available with regard to these commands, even within the

CAD or CAS industry.  For example, "Drag" is usually termed "Move," and 20-20

Design's use of the terms "Center", "Duplicate" (in ProKitchen's Help File) and

"Extrude" is not standard.

18. Zeldin addresses ProKitchen's use of the phrase "Save as Image" for one of its

functions.  (*Id.* ¶ 40.)  Regardless of what Zeldin learned from a Google search, the

phrase is not common in the kitchen design software industry, and is an expressive

choice made by 20-20.

19. Zeldin states that the look and placement of ProKitchen's panels and their search

functions are dictated by CAD conventions.  (*Id.* ¶ 49.)  Many choices made by 20-20

were made for reasons specific to 20-20 Design, and are irrational when only partially

mimicked in another company's product.  For example, 20-20 chose to name its

management panel "Information Box" because the panel shows previews of items and

provides explanations and descriptions for the current function being performed

and/or details of the items selected in the Work Area.  ProKitchen's "Info Box," on

the other hand, provides no additional information regarding any of the items it

displays – it functions as a preview box, not an info box.

20. Zeldin states that "it would be overly laborious to discuss each and every one" of the

commands of ProKitchen that Davis found infringed upon 20-20's copyright.  He

contents himself with the conclusory statement, "[A]lmost all of [the commands] are

common to Windows or CAD design."  This statement is blatantly misleading, false

and totally fails to respond to the points made by Dr. Davis, since ProKitchen copied expressive choices original to 20-20, touching upon all aspects of the programs, including but not limited to: overall layout and interface design, sequence, appearance and layout of sub-windows, tabs and information boxes, icons and terminology, drawing and modifying walls, placing and modification of kitchen products, catalog navigation, and legal disclaimer.  Due to its incredible lack of specificity, the Zeldin statement above is also meaningless.

21. Zeldin notes that ProKitchen and 20-20 Design both use the "incremental find" feature, in which the program locates matches to the user's search term as the user types the search, and states that such a search function is common feature.  (*Id.* ¶ 46.) Zeldin neglects to state that although such "incremental searches" commonly begin their searches upon the user's first keystroke, both ProKitchen and 20-20 Design delay the search until the user types multiple characters. Again, not only was the "incremental find" copied in ProKitchen, but even more importantly, the entire catalog panel which is used to express placement of items into the work area was also copied from 20-20 Design. Zeldin also notes that the 'incremental find" functions differently in ProKitchen than it does in 20-20 Design. However, from my use of ProKitchen, the "incremental find" seems to be expressed in the same way as in 20-20 Design.

22. Zeldin addresses the similarity between ProKitchen's and 20-20 Design's system of sub-windows with product/folder directories, object location, and a product image,

stating that this is common to many CAD programs, and that there are "very few ways of presenting this information to users." (*Id.* ¶ 49.) This is false. There are many different expressive choices available. (See, for example, Planit). Real View simply chose to copy 20-20 Design.

23. In discussing the number of panels ProKitchen and 20-20 Design allow the user to view at any one time, Zeldin states that ProKitchen allows the user to see up to four panels, while 20-20 Design limits the user to two. (*Id.* ¶ 53.) This is false. 20-20 Design also has the option of displaying multiple windows, not just two, and the two programs are similar in this respect. In contrast, Configura and Planit use a different system, which provide a two view "multiview" (*id.* ¶ 54 & Zeldin Ex. D, p. 27.)

24. Zeldin poses certain questions that a potential customer might ask. (Zeldin Aff. ¶ 62.) Each of these questions relates to a function, or an idea – not the expression of the idea. ProKitchen has systematically copied 20-20's expression, while others have found distinct and original expressions for these functions. (See, for example, Planit.)

25. Zeldin defends Real View's appropriation of 20-20 Design's unique "Placement Zones." (Zeldin Aff. ¶¶ 64-68.) His defense cannot change the fact that Real View has copied the expressive elements that make up this unique feature, and has done so unabashedly.

26. In response to Davis' observation that ProKitchen's legends for disclaimers regarding dimensions and sizes are similar to 20-20 Design's legends, Zeldin provides

"numerous examples of similar or identical 'legends'" that are available on the internet. (*Id.* ¶ 69 & Zeldin Ex. D, pp. 71-75.) The examples he gives are taken from 20-20 Design users who have paid 20-20 to use 20-20 Design, and therefore have the right to use 20-20's originally created disclaimer.

27. Zeldin states that Real View has never instructed anyone associated with the company to state that "ProKitchen is the same as 20-20 Design, or that it is a cheaper version of 20-20 Design. (Zeldin Aff. ¶ 70.) Nonetheless, 20-20 has received reports that Real View's agents have been making such statements.

28. Zeldin references 20-20's complaint that Real View has used the 20-20 name in its hiring ads, but sensibly does not refute the allegation, as it is true. (*Id.* ¶ 70.)

29. Zeldin states that Real View never set or modified training requirements in order to harm 20-20. (*Id.* ¶ 70.) The entire strategy behind the introduction of ProKitchen was to benefit from the investment 20-20 had put into its product, including training customers in its use. Real View has no need to train its customers when they have already been trained by 20-20.

30. I am aware of at least one case where a representative of Real View stated that 20-20 Design was in deep financial trouble. This leads me to believe that Real View has made additional false and deceptive statements to customers and potential customers, including customers and potential customers of 20-20, concerning the quality of the 20-20 Design product and the financial stability of 20-20 Technologies.

31. Customers in the market are confused or misled as to the origin of the ProKitchen product, and such confusion has caused and continues to cause damage to the goodwill and reputation of 20-20 in the market. There have been many instances where customers have asked if ProKitchen was a different version of 20-20 Design, at least one customer called a 20-20 industry consultant for technical support on ProKitchen thinking she had purchased 20-20 Design, and at least one manufacturer told one of its dealers that ProKitchen was a 20-20 product.

32. The 20-20 Design trade dress (including its look and feel, and the expression, selection, and arrangement of its features) is distinctive, has been used throughout the United States, Canada and the world, and is well known to the trade and members of the purchasing public. Customers generally associate and identify the 20-20 Design trade dress with 20-20.

33. Upon seeing ProKitchen and its interface, customers are very likely to associate that product with 20-20 and/or 20-20 Design and be confused into thinking that ProKitchen is one of, or is related to, 20-20 products, or that 20-20 somehow endorses or licenses ProKitchen, or that Real View and 20-20 are somehow affiliated or associated. Indeed, as stated above, there have been many instances where customers have asked if ProKitchen was a different version of 20-20 Design.

34. Real View uses the similarity in features and appearance, including the look and feel, between ProKitchen and 20-20 Design, as the basis for inducing customers and prospective customers to purchase Real View's product. For example, during a

manufacturer's sales meeting where a Real View sales representative presented the ProKitchen product, when a comment was made about the extensive similarities between ProKitchen and 20-20 Design, Real View responded by saying "everything but the price".

35. Real View have also engaged and continue to interfere with 20-20's established relationships with its supporting manufacturers from the residential kitchen industry. Real View has been offering 20-20 Technologies' supporting manufacturers certain products and services at prices that are very much below industry practices, such as free catalog creation services.

36. It appears to me, after reading the Zeldin affidavit, that Real View systematically fails to address the issue of expression of ideas in 20-20 Design and instead focus on the ideas behind this expression which they have copied in ProKitchen   RealView copied 20-20 Design's expressive choices though others were available.

37. I believe that the copying made by RealView of 20-20 Design is drastically different from the "copying" made by Borland of the Lotus menu commands. In the latter, Borland provided a translation of the Lotus menu command language in its application. One could compare this to translating words from English to French for French speaking users to understand and use. Borland did not copy the Lotus interface as RealView copied the 20-20 Design interface.

38. I understand that Real View alleges that all elements copied from 20-20 Design are "menu commands" necessary to operate 20-20 Design without which the program would be inoperable, akin to buttons on a VCR which are mandatory just to operate it. This is untrue. Real View has copied interface elements, screen displays, etc.; their copying has resulted in extensive similarities original to 20-20's expressive choices, touching upon all aspects of 20-20 Design, including but not limited to: overall layout and interface design, sequence, appearance and layout of sub-windows, tabs and information boxes, icons and terminology, drawing and modifying walls, placing and modification of kitchen products, catalog navigation, legal disclaimer, etc.

39. I also have many disagreements with the report submitted by Daniel Abbott and I will address these during my testimony at trial or in a later affidavit, once the report is properly filed with the Court, since it is my understanding that his report is not before the court on this summary judgment motion.

40. I am prepared to testify at trial in greater detail about the ideas in 20-20 Design and what choices 20-20 made in deciding how to express those ideas.  Some examples include the following:

- The idea behind the overall screen layout of 20-20 Design was to provide the user with a distinctive and intuitive user experience to assist this user throughout the kitchen design. The overall screen layout in 20-20 Design was almost identically copied by Real View in ProKitchen. Indeed, almost all elements of the main screen, including the location of the different work area components, of 20-20 Design have been copied in ProKitchen – ProKitchen has taken the exact same approach as 20-20 Design for each component, i.e. Floor Plan, Elevation, Information Box, Edit Box, Vertical Toolbar, Drag &

Drop List, Help on current step, Display Tabs for Floor Plan, Main Menu and Horizontal Toolbar.

- The idea behind 20-20 Design's floor plan "View Tabs" is to allow the user to have multiple views of a same floor plan. 20-20 Design chose to express the idea by placing "View Tabs" at the bottom of the floor plan, as did RealView, in ProKitchen. Indeed, in both 20-20 Design and ProKitchen: a) View Tabs are used to fulfill the idea noted above; b) View Tabs can be renamed, and in the same manner; c) View Tabs are displayed at exactly the same place; d) the user can control what is visible on each of the View Tabs (i.e. cabinets, countertops, etc.); e) the user can print one or more of these tabs at one time and f) are highly similar;

- The idea behind the Display Settings associated with the floor plan View Tabs is to allow the user to configure different visualization schemes for one same design. 20-20 chose to express this idea through a unique looking and organized Display Settings dialog window. This expression in 20-20 Design was almost identically copied by Real View in ProKitchen. Both 20-20 Design and ProKitchen, a) use a Display Setting dialog with a nearly identical layout which includes tabs to move between options for Items, Dimensions, Grid and Units (20-20 has Grid and Units in 1 tab); b) allow the user to change the color of lines, dimensions, font, grid spacing, line color and background color from within the Display Settings dialog; c) only have 3 options for unit of measure, feet, feet-inches and millimeters; and d) allow the user to save the settings for future use. Considering ProKitchen's very poor use of space within the Display Setting dialog, it appears that the way this is being expressed has nothing to do with functionality, method of operation and process and everything to do with copying 20-20 Design`s expression.

- The idea behind the Wall Thickness feature is to adjust the thickness to reflect real world measurements. The expression in both 20-20 and ProKitchen of the default Wall thickness is 4" when in reality the standard thickness of a residential interior wall would be 4 5/8". A 2x4 is 3 5/8" and in residential construction 1/2" sheetrock is typically used.

- The idea behind the Trims element in the Place menu is to allow the user to place Moldings and Toe-Kicks. ProKitchen only contains Moldings, but Real View chose to copy 20-20 Design's expression in its name and screen display..

- The idea behind 20-20 Design's Add Line features was to allow the user the option of attaching a note to an object within the Work Area of the application. 20-20 Design expressed this idea by creating a box in which the comment appears and a simple line from the object to the box and naming this

feature "Add Line". Other kitchen design software products express this idea by using a line with an arrow pointing from the object to the box, naming this feature "Leader". Clearly, other expressive choices were available to Real View here. Real View nonetheless copied this expressive choice within 20-20 Design without questioning either its logic or the other options available.

- The idea behind 20-20 Design's Rotate Wall feature is to provide the user with the ability to change an angle of a wall after it has been drawn. The expression of this idea chosen by 20-20 has been copied almost identically by Real View in ProKitchen. In both 20-20 and ProKitchen, the idea is expressed through a screen displayed sub menu obtained through a right-click on the wall indicating the "rotate" option which then offers the user a further sub menu in which "Rotation Center" (same term is used in both 20-20 Design and ProKitchen) is selected. Also, in both 20-20 Design and ProKitchen when a wall is rotated (changing its angle relative to another wall), items within the placement zone of the wall do not move to the new location, contrary to expected behavior.

- The idea behind placing cabinets is to allow the user to place cabinets in the work area of the application. The entire expression of this idea chosen by 20-20 was copied by Real View. In both 20-20 Design and ProKitchen; a) items are chosen through a drop down menus listing the categories, catalogs and items within each category b) there are the same three different ways to access the place cabinet process, menu entry, toolbar shortcut and the drag & drop list; c) there are two distinct ways to place cabinets – 1) menu entry & toolbar shortcut make the user select the item an then they fall into a place mode (select & Place). This method is expressed in 20-20 to support legacy processes to reduce the learning curve from one release to the next; and 2) drag & drop method from the drag & drop list; d) the user falls into a drag mode once the cabinet has been first placed on the wall, construction line or in free mode; allow the user to place the cabinet on a wall, construction line or in free mode; e) allow the user to type the location of the cabinet in relation to the placement zone or origin point of the drawing; f) allow cabinets to be placed either on the floor plan or the elevation work area; g) provide collision detection so that items cannot overlap each other – also if you hold the ctrl key down while dragging the cabinet you will be able to override the collision detection. Real View has also copied the similar expression used in 20-20 Design for placing all other objects including windows and doors.

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Signed under the pains and penalties of perjury this 30 day of June 2009.

[signature to be provided shortly]

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William Smith

**Certificate of Service**

I hereby certify that on July 1, 2009, a true and
correct copy of the foregoing document was served
upon opposing counsel by electronic case filing.

_____ /s/ Timothy C. Blank